

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 171 of 2005
With
CIVIL APPLICATION No. 3341 of 2005
In APPEAL FROM ORDER No. 171 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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VINODCHANDRA MOTILAL THAKKER - Appellant(s)
Versus
PELICAN PHARMACEUTICALS PVT LTD - Defendant(s)

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Appearance :

MR YJ TRIVEDI for Appellant(s) : 1, MR JATIN Y TRIVEDI for Appellant(s) : 1,
MR PREMAL JOSHI WITH MS VITTAL N SHUKLA for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 27/02/2006

ORAL JUDGMENT

1. Vinodchandra Motilal Thakker - HUF, appellant-original plaintiff, has filed this appeal from order

under Order 43 Rule 1 of the Code of Civil Procedure, against judgment and order dated 29.3.2005 passed by the learned Judge, Court No.14, City Civil Court, Ahmedabad, in Regular Civil Suit No.194 of 2005 – order below Exh.6 notice of motion filed by original plaintiff herein. By the impugned order the learned Judge was pleased to dismiss the notice of motion and ad-interim injunction which was granted earlier ex-parte on 1.2.2005 was vacated.

2. Heard Mr.Y.J.Trivedi, learned advocate for appellant-original plaintiff and Mr.Premal Joshi, learned advocate with Ms.V.N.Shukla, learned advocate appeared on behalf of respondent-original defendant.

3. The facts giving rise to this appeal from order are as under:-

3.1 The plaintiff has filed a suit for infringement of trade mark, infringement of copyright and for passing off action against the defendant-respondent herein. It is the case of the plaintiff that plaintiff is owner of registered trade mark "Ankit Kitaction-500", the label which has been produced at Annexure "A" to the appeal

from order since 1992 in class-05 pharmaceutical and medical preparation. It is the case of the plaintiff that defendant has adopted the name "Pelican Pick-Acxan 500" and sold and marketed the medicines and pharmaceutical product also in class-05 somewhere in 2001.

3.2 Mr.Y.J.Trivedi, learned senior advocate has invited my attention to both the labels as well as some of the documents which the plaintiff has produced. From the certificate of registration of trade mark under Sec.23 of 1958 Act it appears that the plaintiff has obtained registration from April 1992 for pharmaceutical and medical products in class-05. The plaintiff has applied for registration trade mark as well as copyright also.

3.3 The learned advocate for the plaintiff has also invited my attention to the sale figure from October 1991 to December 2004 and advertisement expenses incurred by them in this behalf which is on page 32 of the paper book.

3.4 Mr.Trivedi has also invited my attention to the

legal use certificate issued by Registrar of Trade Marks which provides that registration of this trade mark shall give no right to exclusive use of the mark 500, a triangle and all descriptive matters appearing on the label. He has also invited my attention to the fact that defendant though it is alleged that he has started use from 1998 but from the record it appears that he has started selling and marketing the said products somewhere in 2001 and 2002 i.e., page 66 of the paper book.

3.5 The learned advocate for the plaintiff has invited my attention to the fact that when the suit was filed somewhere in 2005, the learned trial Judge has granted ex-parte ad-interim relief on interim injunction application on 1.2.2005 and the learned trial Judge has granted the interim relief on the same day. However, when the defendant appeared then after hearing the defendant the learned trial Judge has vacated the interim relief by the order dated 29.3.2005 but the same was continued by the trial court for some time.

3.6 The learned advocate for the plaintiff has stated that thereafter appeal from order was filed on

19.4.2005 and this Court has continued the said interim relief from time to time and ultimately admitted the appeal from order on 6.5.2005 and the Court restrained the defendant from selling and marketing the product as referred to Annexure "B" to the appeal from order. The Court has also passed the order of Court Commissioner and the Court Commissioner's report is also dated 2.2.2005 which is also taken on record in this behalf.

3.7 The learned advocate for the plaintiff has invited my attention to the fact that the judgment of the Hon'ble Apex Court in the case of Parle Products (P) Ltd. Vs. J.P. & Co., Mysore reported in AIR 1972 SC 1359 where the Hon'ble Supreme Court has laid down the principle regarding "deceptive similarity". He has also relied upon another judgment of the Hon'ble Apex Court in the case of Laxmikant V.Patel Vs. Chetanbhai Shah and another reported in (2002) 3 SCC 65 particularly paras 13 and 14 on page 73 & 74. He has also relied upon another judgment of Hon'ble Apex Court in the case of Midas Hygiene Industries (P) Ltd., & Anr. Vs. Sudhir Bhatia and others reported in (2004) 3 SCC 90 particularly para 5 page 91.

3.8 He has also relied upon a Division Bench judgment of Bombay High Court in the case of M/s.National Chemicals and Colour Co. and others Vs. Reckitt and Colman of India Limited and another reported in AIR 1991 Bombay 76 and also judgment of this Court in the case of Pam Pharmaceuticals Vs. Richardson Vicks Inc. & Others reported in 2001(1) GLR 125 and also the observations made by this Court in Special Civil Application No.2711 of 2006 in the matter of Cadila Pharmaceuticals Ltd. Vs. Siraigo Pharmaceuticals Pvt. Ltd., order dated 21.2.2006.

4. On the other hand, Mr.Premal Joshi, learned advocate appearing on behalf of the respondent has relied upon three judgments. (i) Cadila Laboratories Ltd. And another Vs. Dabur India Limited reported in 1997(1) Arb.L.R. 704, (ii) Anjendra Kumar Aggarwal Vs. Kruzer Herbals reported in 1997(1) Arb. L.R. 555 and F.Hoffmann-La Roche & Co.Ltd., Vs. Geoffrey Manner & Co. Pvt. Ltd., reported in 1969(2) SCC 716.

4.1 Mr.Joshi has stated that the defendant has also applied for registration of trade mark before the Registrar of Trade Marks and plaintiff filed opposition

of the same on 9.7.2005.

5. Though both the sides argued the matter at length, but both the learned advocates have requested this Court that this Court may not observe anything on the merits of the matter because if this Court observe anything on the merits of the matter then that will affect the merit of the plaintiff's case as well as defendant's case before the trial court. However, without being adjudicating anything on the merits of the matter, if the following directions are issued the same will be in the interest of justice.

(i) This Court requests the learned City Civil Judge to hear and decide the suit of the plaintiff as expeditiously as possible but not later than 31st August, 2006.

(ii) Meanwhile the interim injunction granted by the trial court dated 1.2.2005 which was granted by the trial court though it was vacated but the same was continued by the this court till today, the same will continue till final disposal of the suit.

(iii) It may be observed that this Court has not expressed any opinion on the merits of the matter and therefore it will be open for the learned trial Judge to decide the matter in accordance with law particularly after considering the oral as well as documentary evidence produced by both the sides in this behalf.

(iv) Both the learned advocates have assured that both the parties will cooperate in the hearing of the matter before the trial court.

6. With the aforesaid observations and directions, this appeal from order is disposed of with no order as to costs.

7. In view of the same, Civil Application No.3341 of 2005 is also disposed of with no order as to costs.

(K.M. Mehta, J.)

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